FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 25 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

TERM: A. D. 1949

No. 719

Lawrence E. Kelly, Administrator of the Estate of H. M. Kelly, Deceased, and Mollie Kelly,
Petitioners,

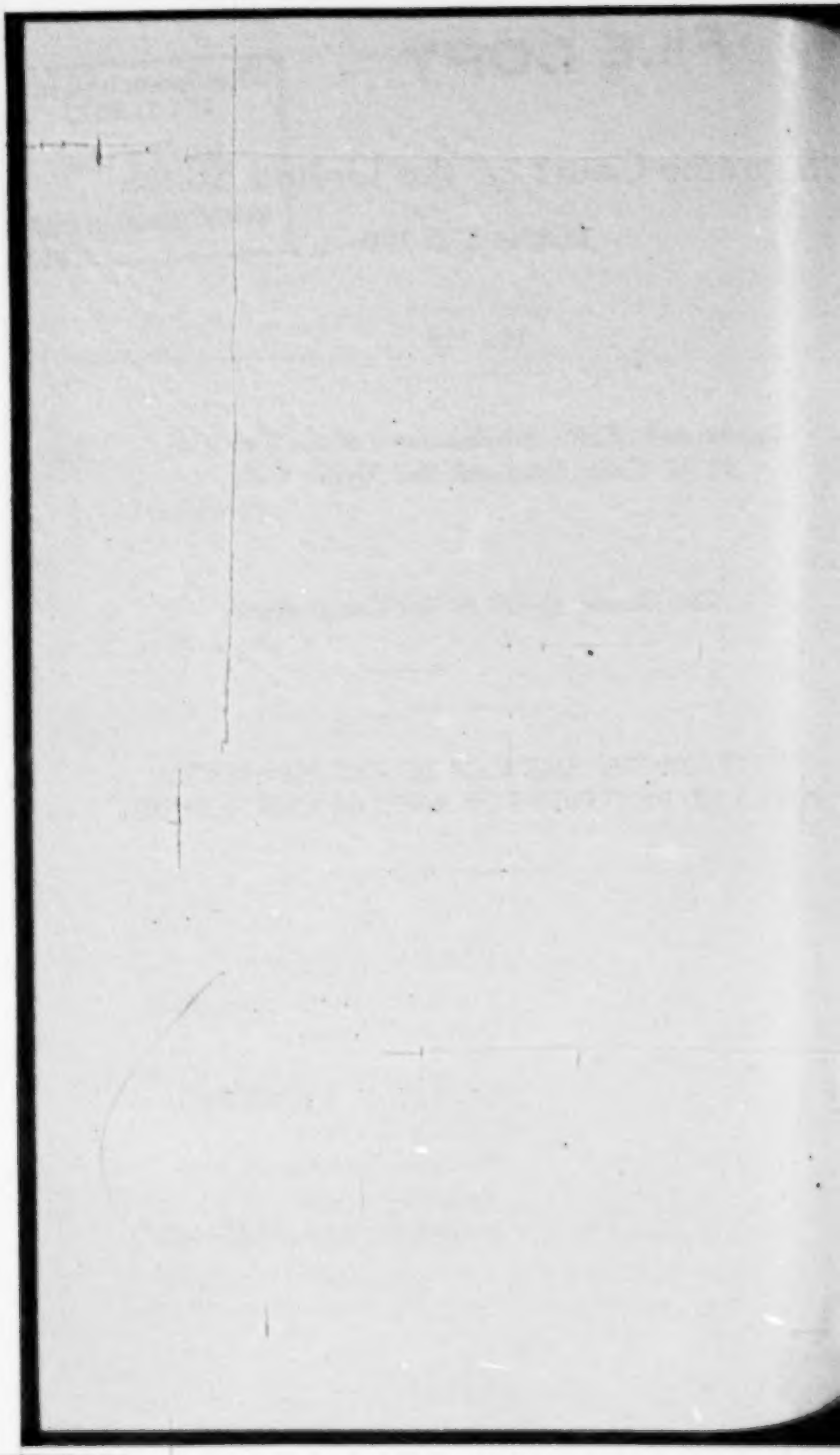
v.

The Shamrock Oil & Gas Corporation
Respondent.

PETITIONERS' ANSWER TO RESPONDENT'S REPLY ON PETITION FOR WRIT OF CERTIORARI

HARRY F. KELLY,
Detroit National Bank Bldg.,
Detroit, Michigan.

HOWARD F. SAUNDERS,
ALBERT SMITH,
Amarillo Building,
Amarillo, Texas,
Attorneys for Petitioners.



Supreme Court of the United States

TERM: A. D. 1949

No. 719

Lawrence E. Kelly, Administrator of the Estate of H. M. Kelly, Deceased, and Mollie Kelly,
Petitioners,

v.

The Shamrock Oil & Gas Corporation
Respondent.

PETITIONERS' ANSWER TO RESPONDENT'S REPLY ON PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The Respondent's reply on Petitioners' application for writ of certiorari ignores two holdings of the Circuit Court in this very case by which Respondent is bound: (1) The evidence did raise the issue of a "dual agency" unknown to the seller, H. M. Kelly; and (2) it is the law of Texas that if a "dual agency" is found to have existed unknown to one of the principals, that principal is entitled to recind the transaction (Circuit Court Opinion, R. 298-299 and 313-314).

"However, when it comes to a case of double agency, the principal who did not know that the agent in his employ was also the agent of the other party to the contract has the absolute right to repudiate the transaction upon the discovery of the truth —So, as a matter of public policy, it is generally held that a deal conducted wholly or in part by an agent of one of the parties who at the same time acted for the opposite party may be rescinded by the one ignorant of the double employment without showing any injury or intent to deceive. Rescission is his absolute right." Olson v. Pettibone, 48 A.L.R. 915. Idem: Kansas Life Ins. Co. v. First Bank of Truscott, 78 S.W. 2d 585 (Texas Commission, Pgh. 2); 2 A.J., Agency, Sec. 265; Newton v. Mann, 147 A.L.R. 769, Pghs. 6 and 7.

"If, without knowledge of the common agency, two persons employ the same agent to conduct a transaction between them, the transaction is voidable at the election of either." Restatement of the Law, Agency, Section 313.

"And it makes no difference that the principal was not in fact injured, or that the agent intended no wrong, or that the other party acted in good faith. The double agency is a fraud upon the principal in such case, contravenes public policy, and the Courts will refuse to enforce a contract growing out of such agency or award damages for its breach." Bass v. Tolbert, 112 S. W. 1078 (Texas C.C.A.).

The Shamrock admits that Fowlston was the trusted agent of H. M. Kelly upon whom Kelly had relied for a number of years (R. 25, Pgh. IIB). Kelly paid Fowlston a $3,200 commission on the deal (R. 197 and Exhibits Pages 83 and 85). J. H. Dunn, vice president of the Shamrock, testified that he knew Fowlston had been looking after some matters for Kelly (R. 150); and that Shamrock paid Fowlston a $500 commission on the deal, saying:

Q. What did the $500 represent?

A. It represented a commission.

Q. A commission?

A. Yes, sir (R. 152-153).

Q. (Interrupting) For his services in negotiating the Kelly deal?

A. Yes, sir (R. 153).

Q. Now, the plaintiffs' Exhibit No. 1, is this the $500 check which you spoke of on last Saturday as having issued to Mr. Fowlston for the commission in the acquisition of the title to 238, Moore County, Texas?

A. It is, yes, sir (R. 153).

Q. The commission which you paid Mr. Fowlston of $500, was that the only commission you ever paid him?

A. You mean in connection with this transaction?

Q. Any transaction.

A. **Oh, no, we have paid him other commissions. He has performed some other services at times, but I don't recall specifically (R. 157).**

The $500.00 commission check and voucher showing that it was a commission are shown as plaintiffs' exhibits "F," "G" and "H," pages 26, 27 and 28, of the Original Exhibits. The expense check and voucher showing Fowlston was Shamrock's agent are shown as plaintiffs' exhibits "H," "I" and "J," pages 28, 29 and 30 of the Original Exhibits. This deal was handled by J. H. Dunn (R. 243-244) and he directed the issuance of those checks (R. same).

Realizing, finally, the predicament in which the truth had placed the Shamrock, Dunn testified that "the commission was paid for Mr. Kelly * * * " (R. 228). He never did deny that the $500 check was a "commission" check. Instead he said that "any commission paid to Mr. Fowlston would have to be added to our cost of the property" (R. 224). Kelly did not know Fowlston was the agent of Shamrock (R. 108) or that Shamrock was paying Fowlston a commission (R. 107). On February 21, 1941, Kelly wrote Fowlston as follows:

"Does this mean $14,400.00 to me net, or in other words, will they take care of any fee which you might request for bringing us together * * * ? * * * **Have**

them write me just what they are willing to do and the amount of money that they are **willing to pay,** and I will give further consideration to the proposition, and if I am in the mood that I am in now I will be inclined to accept it, provided it meets with the conditions herein enumerated" (Exhibits Page 55, Fifth Pgh.).

The letter was shown to Shamrock and the request ignored (R. 250). Receiving no reply, Kelly wrote Shamrock direct on March 5, 1941, as follows:

"If you have an offer at your command, please be kind enough to advise me just what parties are interested in the oil or gas situation of this section" (Exhibits Page 58, Fourth Pgh.).

Shamrock did not answer that letter. It did not tell Kelly that it would pay the commission. It did not tell Kelly that the price to him would be net. Nor did Fowlston do so (R. 250 and 107).

Fowlston wrote Kelly exactly ten letters between February 21, 1941, and the closing of the deal, and not once did he mention a **net deal** or that Shamrock was paying him a commission (Original Exhibits Pages 57, 59, 63, 64, 69, 72, 73, 77, 78, 79). The memo of May 3d, 1941, shows that the full purchase price was to be sent to H. M. Kelly and that Kelly was to pay Fowlston his commission (Original Exhibits Page 158). The letter to the bank enclosing the deed to Shamrock and a draft for the purchase price states that Fowlston had been acting as the agent of Kelly and that the full purchase price is to

be sent to Kelly. Shamrock undoubtedly saw that letter when it paid the draft.

We asked Respondent to point out to you any portion of the Trial Court's charge submitting the Plaintiffs' theory of "dual agency unknown to the seller" to the jury. The Respondent now says that Plaintiffs' theory was submitted to the jury in this instruction:

> "I give you also the plaintiffs' Requested Instruction Number Nine:
>
> "You are instructed that by agency is meant, a relationship which is based upon a contract, express or implied, of the parties, or created by law, by virtue of which one party is employed and authorized to act for another. The party so employed is the agent and the one who so employs is the principal. In many instances agency arises not from the use of express language, nor from the existence of a well defined relationship, but from the general conduct of the parties. This relation may exist whether the parties so designate it or not. Agency may be established by circumstances, such as the relation of the parties and their conduct with reference to the subject matter involved.
>
> "You are further instructed that where a party acts in behalf of another under the latter's authority and for the latter's benefit, he is, in law, the agent of the latter." (R. pp. 282, 283).

There isn't a line or word in that instruction about "dual agency." The Defendant admitted that Fowlston was Kelly's agent. One element of the Plaintiffs' right to recover having been admitted, the Plaintiffs therefore requested these instructions:

> "If you find by a preponderance of the evidence that the relation of principal and agent existed between C. J. Fowlston and the Shamrock Oil & Gas Corporation from January 20, 1941, to June 16, 1941, and if you further find from a preponderance of the evidence that H. M. Kelly did not know C. J. Fowlston was the agent of the Shamrock Oil & Gas Corporation you will return a verdict for the plaintiffs." (R. 42, Request No. 2).

In a separate request, we also asked the trial court to give a broader charge on dual agency that plaintiffs were entitled to, but which the court refused, reading:

> "You are instructed that if C. J. Fowlston was acting as the agent of the Shamrock Oil & Gas Corporation during the negotiations leading up to the execution of the Deed, dated June 16, 1941, and that if you further find that H. M. Kelly did not know that C. J. Fowlston was acting as the agent of the Shamrock Oil & Gas Corporation, you will return a verdict for the plaintiffs, and this without reference to whether or not H. M. Kelly sustained any damages or injuries as a result of having made the trade with the Shamrock Oil & Gas Corporation.

"In this connection you are further instructed that it is not necessary that either Fowlston or Shamrock Oil & Gas Corporation intended any fraud or intentional injury to H. M. Kelly, but that nevertheless, your verdict should be for the plaintiffs, if you find that C. J. Fowlston was acting as the agent of the Shamrock Oil & Gas Corporation in negotiating the purchase of Kelly's property, and if you further find that H. M. Kelly did not know that C. J. Fowlston was so acting." (R. 49, Request No. 10).

Both of the requested instructions were refused (R. 42 and 49). Obviously, the instruction pointed out by Respondent as submitting the Plaintiffs' theory on "dual agency" does not touch that proposition. It bears particularly on the establishment of simple agency. It does not touch the Plaintiffs right to recover if the jury found that Fowlston was acting as the agent of the Shamrock unknown to Kelly, the seller.

The principle of estoppel urged by Respondent has no application. **That matter was not plead as a defense in the trial court. It was not submitted to the jury.** The record shows or at least raises an issue as the Circuit Court of Appeals held that Fowlston was acting as the agent of the Shamrock unknown to Kelly. That fact, coupled with the Defendant's admission that Fowlston was Kelly's agent, entitled Plaintiffs to a judgment. The Circuit Court so held. Plaintiffs were entitled to an instruction on dual agency unknown to the seller, because without it the jury could not and did not pass upon the main issue in the case.

The Respondent asserts that Kelly ratified the "dual agency" and that he failed to file a suit to cancel within a reasonable time (Pages 16 and 17 of Respondent's Reply to Petition for Writ of Certiorari). The Defendant did not plead ratification (R. 24-27). No such issue was submitted to the jury. H. M. Kelly testified without contradiction of any kind or character that he did not learn about the "dual agency" until his son returned from Texas less than a month before this suit was filed (R. 108). The four-year Statute of Limitations govern these actions in Texas. The defendant did not plead that the suit was not filed within a reasonable time, did not plead laches, or limitation, and no such issues went to the jury. In fact, the matter is raised in this court for the first time.

The Respondent asserts that Petitioners did not complain of the Court's charge in the Trial Court. We requested the issues set out before and the court refused them. Judge Hand expressed the law on that subject thus:

> "The request for further instruction was in substance equivalent to an objection to the charge * * * no objection could be plainer than the request for an instruction diametrically opposed to the one given in the court's charge." Wright v. Farm Journal, 158 F. 2d 978, (Pghs. 2-5).

With reference to the court's refusal of petitioners' requested instruction on circumstantial evidence, the Respondent points out that the court charged the jury that:

> "Agency may be established by circumstances, such as the relation of the parties and their conduct

with reference to the subject matter involved." (R. p. 283).

The instruction given actually aggravated the error in refusing to charge generally on circumstantial evidence for these reasons: The Petitioners sought to set aside the deed for these reasons: (1) dual agency unknown to seller; (2) certain fraudulent representations; and (3) a fraudulent reduction in the gas take from the well on the land immediately preceding the opening of negotiations and continuing until the deal was closed. By charging that "agency" could be proved by circumstantial evidence, the court inferentially instructed the jury that no other issue in the case could be proved by that character of evidence. The average monthly gas take from Kelly No. 1 for the five months **preceding** December 1940, was 84,410,000 cubic feet. The average monthly allowable for that five months period was 85,358,000 cubic feet (R. 169). The royalty check for December, 1940, was mailed out about January 20, 1941 (R. 184). Fowlston's letter opening negotiations was mailed on January 20, 1941 (Exhibits Page 32). The average monthly gas take from Kelly No. 1 **during the period of negotiations** (some seven months) was 37,978,000 cubic feet—a two-thirds reduction in the monthly take with the exception of the month of April, 1941. The average monthly allowable for those seven months was 258,278,000 cubic feet (R. 169-170). The deal was closed in June, 1941 (Exhibits Page 87). The average monthly take from Kelly No. 1 for the **succeeding** six months was 251,161,000 cubic feet (R. 110 to 121). The average monthly allowable for that six months period was actually less than it had been for the six

months during the negotiations—250,110,000 (R. 110 to 121). The royalties paid Kelly were reduced accordingly (Exhibits Page 91).

The gas was sweet. It could be used for light and fuel purposes (R. 175). Kelly No. 1 was connected to the defendant's McKee plant at all times. An analysis of the McKee plant operations report filed with the Railroad Commission shows that Shamrock had a market for the full allowable from Kelly No. 1 at all times during the negotiations (Exhibits CC through PP, Exhibits Pages 128 through 157). As an illustration, we take the month of January, 1941, shown as plaintiffs' exhibits EE pages 132-133: Daily intake 214,329,000 cubic feet; Plant used residue daily 8,602,000 cubic feet; leases used 142,000 cubic feet daily. Total legitimate sweet gas uses: 8,602,000 plus 142,000 equals 8,744,000 cubic feet daily. Gas taken daily from the two sweet gas wells was 3,686,000 cubic feet. The Shamrock therefore had an additional use or market for 8,744,000 minus 3,686,000 equals 5,058,000 cubic feet daily. **That market was not supplied until Shamrock began to take the full allowable from Kelly No. 1 in July, 1941.**

It should be noted that the J. B. Schlee well with an allowable of one-third that of Kelly No. 1 was the only other sweet gas well connected to the McKee plant during the negotiations. Although the allowable from the Schlee well was slightly less than one-third that of the Kelly well, Shamrock continued to take almost 3 times the amount of gas from the Schlee well that it took from the Kelly well during the negotiations (Exhibits P through V pages 96 to 109). It should be noted further

that the take from the Schlee well **was not** decreased when the Shamrock started taking the full allowable from Kelly No. 1 in July, 1941, (Exhibits W through M pages 110-119).

Kelly testified that the reduction in the gas take from the well influenced his decision to sell and that if the reduction had not been made he would not have sold the land at all (R. 117).

Your Petitioners were entitled to the instruction on circumstantial evidence. Rea v. Missouri, 21 Lawyers Edition, 707, was reversed for a failure to charge on circumstantial evidence. The court said:

> "To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient but in most cases it is the only proof that can be adduced."

Respondent asserts that "Petitioners say, though, that there was error in the manner in which the trial court submitted their theory of double agency." No. What Petitioners say is that the court did not submit their theory on dual agency in any shape, form or manner. We asked the respondent, Shamrock, to point out to you any portion of the court's charge that it claims instructed the jury on the Plaintiffs' theory of "dual agency." The Respondent has not done so because it is not in the court's charge. The Petitioners alleged "dual agency" in Paragraph IV. of their pleading in this language:

"Plaintiffs further represent that during all of the negotiations and transactions terminating in the sale of the surface and all of H. M. and Mollie Kelly's interest in the oil and gas except a one-sixteenth non-participating oil royalty, C. J. Fowlston was representing them as their agent and at all of the times was also representing the Shamrock Oil & Gas Corporation and acting as the agent and representative of the Shamrock Oil & Gas Corporation. H. M. and Mollie Kelly never at any time knew that C. J. Fowlston was acting as the agent of the Shamrock Oil & Gas Corporation. On the contrary, H. M. and Mollie Kelly were led to believe and did believe that Fowlston was representing H. M. Kelly and H. M. Kelly alone, and did not learn otherwise until early in 1945. They would not have made the trade with the Shamrock had they known Fowlston was acting as the Shamrock's agent in the negotiation terminating in the trade hereinafter stated, all of which was well known to the defendant corporation."

We requested an instruction on "dual agency." It was refused. Petitioners were therefore deprived of the right to have that issue passed upon by a jury of their peers. They have, therefore, been deprived of their property without due process of law.

WHEREFORE, Petitioners pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

Detroit National Bank Bldg.,
Detroit, Michigan,
Attorney for Petitioners.

Amarillo Building,
Amarillo, Texas,
Attorney for Petitioners.

Amarillo Building,
Amarillo, Texas,
Attorney for Petitioners.